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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Valerie Moore,

Plaintiff,

vs.

State of Arizona , et al.,

Defendants.

No. CV 22-01938-PHX-JAT (JFM)

ORDER

Plaintiff Valerie Moore, through counsel, initiated this action in Maricopa County Superior Court, and Defendants removed the action to federal court. (Doc. 1, No. CV2022-009779.) Plaintiff asserted claims under 42 U.S.C. § 1983 and state law against the State of Arizona, Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) Officer Carlos Vargas, and ADCRR Director David Shinn. (Doc. 1-4 ¶¶ 5–7.)¹ Before the Court is Defendant Vargas’ Motion for Partial Summary Judgment on Count One. (Doc. 48.)² The Court will deny the Motion as moot.

I. Background

Plaintiff’s claims arose during her prior confinement at the Arizona State Prison

¹ Defendant Shinn was named in both his individual and official capacity. (Doc. 1-4 ¶ 6.) Defendant Shinn has retired as ADCRR Director; therefore, the Court will automatically substitute his successor, Ryan Thornell, as a Defendant in his official capacity. *See* Fed. R. Civ. P. 25(a). Shinn will remain in this action as a Defendant in individual capacity.

² Also before the Court is Defendant Vargas’ Motion to Quash Subpoena of Jossie Perez, which is not yet briefed and will be addressed in a separate order. (Doc. 84.)

1 Complex-Perryville. (Doc. 1-4 ¶ 1.) Plaintiff alleged that on or about August 1, 2021,
2 Defendant Vargas took Plaintiff out of her assigned cell on the pretense of talking to her,
3 took her to an empty cell, and sexually assaulted her. (*Id.* ¶ 30.) Plaintiff alleged that
4 Defendant Vargas told her not to say anything about the assault, and Plaintiff initially
5 complied; however, after a few weeks, Plaintiff reported the assault to ADCRR. (*Id.* ¶¶ 36-
6 38.) The Criminal Investigation Unit (CIU) initiated an investigation. (*Id.* ¶ 38.) Despite
7 Plaintiff’s report and her cellmate’s corroboration of the events of August 1, 2021, CIU
8 determined there was not enough evidence to charge Defendant Vargas with a crime. (*Id.*
9 ¶ 41.) The security cameras that would have supported Plaintiff’s report were either
10 inoperable or the footage was destroyed. (*Id.* ¶ 42.) Thereafter, no further investigation
11 was conducted to determine if there were any other victims. (*Id.* ¶ 43.) And, although
12 Plaintiff was assured that Defendant Vargas would not be assigned to her housing unit,
13 Defendant Vargas continued to have access to Plaintiff’s cell. (*Id.* ¶¶ 44–45.)

14 Plaintiff asserted that she was a medium security prisoner who complied with all
15 requirements for early release. (*Id.* ¶ 46.) Prior to Plaintiff’s report of the assault, she was
16 told her release date was October 20, 2021. (*Id.* ¶ 47.) After Plaintiff reported the assault,
17 she was informed that her release date was changed to April 5, 2022. (*Id.* ¶ 48.) Plaintiff
18 was told that her release date was at the sole discretion of ADCRR Director Shinn. (*Id.*
19 ¶ 49.)

20 Plaintiff alleged that ADCRR has historically failed to protect prisoners from
21 prohibited and unwanted sexual contact and sexual exploitation by encouraging a “no-
22 snitch” environment, by maintaining negligent and deficient video surveillance and
23 retention policies, by allowing officers to take prisoners out of their cells for no legitimate
24 reason and with tacit approval by supervisors, by discouraging prisoners from reporting
25 sexual harassment and exploitation through negative consequences, by maintaining areas
26 within the prison known to be unsecure and not under surveillance, and by maintaining a
27 “code of silence” among officers to discourage “snitching” on fellow officers. (*Id.* ¶¶ 15–
28 16, 18–23.)

1 In Count One of her Complaint, Plaintiff asserted state law claims of sexual
 2 harassment, sexual exploitation, and intentional infliction of emotional distress against the
 3 State of Arizona. (*Id.* ¶¶ 54–62.) In Count Two, Plaintiff asserted state law claims of
 4 retaliation and wrongful detention against the State of Arizona. (*Id.* ¶¶ 63–66.) And in
 5 Count Three, Plaintiff asserted claims under 42 U.S.C. § 1983 for violations of the First,
 6 Eighth, and Fourteenth Amendments against Defendants Shinn and Vargas. (*Id.* ¶¶ 67–
 7 74.) Plaintiff sought damages, attorneys’ fees, and costs. (*Id.* at 10.)

8 **II. Defendant Vargas’ Motion for Partial Summary Judgment on Count One**

9 Defendant Vargas moves for summary judgment on the ground that Plaintiff failed
 10 to serve a notice of claim on Defendant Vargas as required under state law. (Doc. 48 at 3–
 11 4.) Defendant Vargas states that Arizona Revised Statutes § 12-821.01 requires a plaintiff
 12 making a claim against a public employee to serve that employee with a notice within 180
 13 days after the cause of action accrues. (*Id.*). Defendant states that Plaintiff’s claim accrued
 14 on or about August 1, 2021; however, Plaintiff failed to serve a notice of claim on
 15 Defendant Vargas within 180 days of that date or any time thereafter. (*Id.* at 4.) Defendant
 16 Vargas argues that, because Plaintiff failed to file a notice of claim, and the time to do so
 17 has passed, no claim may be maintained against Defendant Vargas. (*Id.* at 3–4.)

18 In her Response, Plaintiff acknowledges that she did not serve a notice of claim
 19 against Defendant Vargas. (Doc. 53 at 3.) But Plaintiff asserts that she did not allege a
 20 direct liability claim against Defendant Vargas in Count One. (*Id.* at 2–3.) Plaintiff
 21 explains that the claim in Count One is a claim against the State of Arizona. (*Id.*) Plaintiff
 22 notes that, under Arizona Revised Statutes § 31-201.01(F), “[a]ny and all causes of action
 23 that may arise out of tort caused by the director, prisoner officers or employees of the
 24 department, within the scope of their legal duty, shall run only against the state.” (*Id.* at
 25 2.) Plaintiff alleges that Defendant Vargas was acting within the scope of his legal duty
 26 when he removed Plaintiff from her cell, moved her to another cell, and assaulted her. (*Id.*)
 27 Plaintiff states that, under § 31-201.01(F), the liability asserted in Count One is only
 28 vicarious liability as to the State of Arizona; therefore, there is nothing in Count One on

1 which summary judgement could be granted in Defendant Vargas' favor. (*Id.*)

2 Plaintiff also states that she served a valid and timely notice of claim on the State of
3 Arizona and argues that, under *Laurence v. Salt River Project Agric. Improvement &*
4 *Power Dist.*, 528 P. 139 (2023), she was not required to serve Defendant Vargas with a
5 notice of claim to pursue her vicarious liability claim against the State. (Doc. 53 at 3.)

6 In their Reply, Defendants assert the parties do not dispute that Defendant Vargas
7 cannot be liable under Count One, but they argue that, because there are allegations within
8 Count One that name Defendant Vargas, there is a potential for ambiguity as to whether he
9 is a Defendant in that Count, which necessitates a summary judgment ruling for clarity.
10 (Doc. 56.)

11 **III. Discussion**

12 Federal Rule of Civil Procedure 56 provides that “a party may move for summary
13 judgment, identifying each claim or defense—or the part of each claim or defense—on
14 which summary judgment is sought.” Fed. R. Civ. P. 56(a). “The Court cannot enter
15 judgment on a claim that is not asserted in any of the pleadings.” *Wildfire Grp., LLC v.*
16 *Prime Ins. Co.*, No. 2:12-CV-847-MHT-PWG, 2015 WL 10015378, at *6 (M.D. Ala. Sept.
17 22, 2015); *Commodity Futures Trading Comm’n v. R.J. Fitzgerald & Co.*, No. 8:99-CV-
18 1558-T-MSS, 2006 WL 1119174, at *1 (M.D. Fla. Apr. 26, 2006) (“because there are no
19 claims for restitution or disgorgement pending before the Court, summary judgement on
20 such claims is unavailable, inappropriate and should be denied as moot”).

21 In her Complaint, Plaintiff alleged that, “[f]or purposes of all state law claims
22 asserted in this matter, Defendant State of Arizona is liable for the acts and admissions of
23 its employees within the scope of their employment, including officers and other
24 employees of ADC under the doctrine of respondeat superior.” (Doc. 1-4 ¶ 7.) In Count
25 One, Plaintiff asserted state law claims of sexual exploitation, sexual harassment, and
26 intentional infliction of emotional distress. (*Id.* ¶¶ 54–62.) Plaintiff alleged that Defendant
27 Vargas used sexual exploitation and/or sexual harassment as a means of inmate control,
28 Plaintiff worked in the kitchen under Defendant Vargas' supervision, Defendant Vargas

1 arranged for Plaintiff to work in the dining room where he made sexually suggestive
2 comments and inappropriately touched her, Defendant Vargas sexually touched and
3 assaulted Plaintiff without her consent and intentionally inflicted emotional distress, and
4 Defendant Vargas coerced Plaintiff into performing a sex act and physically overpowered
5 her to accomplish penetration. (*Id.* ¶¶ 55–59.) Plaintiff further specifically alleged that
6 “Defendant State of Arizona is vicariously liable for the state law torts as alleged in this
7 Count.” (*Id.* ¶ 60.)


8 These allegations sufficiently state a claim against the State for vicarious liability
9 for the allegedly tortious acts of Defendant Vargas. *See Baker ex rel. Hall Brake Supply,*
10 *Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 5 P.3d 249, 254 (Ariz. Ct. App. 2000) (“[a]n
11 employer is vicariously liable for the negligent or tortious acts of its employee acting within
12 the scope and course of employment”). Identifying Defendant Vargas and his conduct
13 within the allegations was necessary to establish the claim for vicarious liability against
14 the State. As Plaintiff points out, however, there is no claim asserted against Defendant
15 Vargas in this Count because any cause of action arising out of a tort committed by an
16 ADCRR employee may run only against the State. Ariz. Rev. Stat. § 31-201.01(F). Thus,
17 there is no claim against Defendant Vargas in Count One on which to grant summary
18 judgment. To the extent that there is any confusion as to whether Defendant Vargas is an
19 individual Defendant in Count One, this Order clarifies that he is not.

20 Further, Defendants do not respond to Plaintiff’s well-taken argument that, under
21 *Laurence*, a plaintiff is not required to serve a notice of claim on the employee to maintain
22 a vicarious liability claim against the employer. (*See* Doc. 53 at 3; Doc. 56 at 2.) Because
23 Defendant Vargas is not a Defendant in Count one, the failure to serve him with a notice
24 of claim does not affect Plaintiff’s vicarious liability claim against the State. (*See* Doc. 53
25 at 3.)

26 For the above reasons, Defendants’ Motion for Partial Summary Judgment will be
27 denied as moot.

28 **IT IS ORDERED:**

(2) Pursuant to Federal Rule of Civil Procedure 25(a), Ryan Thornell is substituted for David Shinn **in his official capacity only**. Shinn remains a Defendant in his individual capacity. The Clerk of Court must update the docket accordingly.


James A. Teilborg
Senior United States District Judge